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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 131

CARMINE VINCENT PALMIERI,
Petitioner,

vs.

FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER[1]

OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District (A 31-33), is reported at 189 So.2d 512. The decision of the Supreme Court of Florida (A 34-37) is reported at 198 So.2d 633.

1. In this brief the following symbols will be used:
"A" for printed Appendix;
"R" for original Record on Appeal.
All emphasis in this brief is supplied unless otherwise indicated.

JURISDICTION

Jurisdiction of this Court is invoked under 28 *U.S.C.*, Section 1257(3).

On August 9, 1966, the District Court of Appeal of Florida, Third District, rendered its Final Judgment affirming the conviction of the Petitioner for armed robbery. Ordinarily this would terminate appellate review, but in this instance the District Court of Appeal certified to the Supreme Court of Florida, under Article V, Section 4(2) of the *Constitution of Florida*, that the decision passed upon a question of great public interest because "it concerns a determination of when the denial of a preliminary hearing in violation of Section 901.23, Florida Statutes, is prejudicial to a defendant."

On May 3, 1967, the Supreme Court of Florida entered its Final Order approving the decision of the District Court of Appeal (A 34-37), thereby rejecting Petitioner's claim that he is imprisoned in violation of the Due Process Clause of the Fourteenth Amendment (A 34-37). Petitioner's Motion for Leave to Proceed in Forma Pauperis and his Petition for Writ of Certiorari were filed on August 10, 1967. This Court granted the Motion and Petition on May 27, 1968.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Appendix. This case involves the Fifth, Sixth, and Section 1 of the Fourteenth Amendments, *Constitution of the United States*, and the following Florida Statutes:

2 Fla. Stat. 1957, p. 3850, Sec. 901.23 (*Duty of Officer After Arrest Without Warrant*).

QUESTION PRESENTED

The Petitioner was arrested at his home at about 1:30 in the morning without a warrant, was not taken before a committing magistrate as required by statute, Section 901.23, *Florida Statutes*, but was incarcerated in the Dade County jail. The next day he was identified in a line-up at the jail by a prosecution witness. About a week later he was identified in another line-up by another prosecution witness. Ten days after the arrest, and not before he had filed a Petition for Writ of Habeas Corpus, the State filed an Information charging him with robbery. The jury found him guilty and he was sentenced to twenty years in prison. In brief, his appeals were disposed of on the grounds of harmless error.

On these basic facts (which will be elaborated on hereafter) the question presented is:

> **Whether or Not the Petitioner's Detention for Ten Days, upon an Arrest Without a Warrant, and Without His Being Taken Before a Magistrate, While Incriminating Illegal Evidence Was Gathered Against Him from Repeated Line-Ups, Amounted to a Violation of the Petitioner's Rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.**

Or, stated differently:

> **Whether the Federal Constitution Requires the Exclusion of Illegally Obtained Line-Up Identification of a Suspect That Occurred When the Police Officials Failed to Take the Accused Before a Magistrate and Where the Evidence Was Gathered During an Unreasonable Delay Between the Suspect's Arrest and Arraignment.**

STATEMENT OF THE CASE

Arrest, Line-Ups and Arraignment

On February 6, 1965, at about 7:30 in the morning (R 14-16; 66-67), a U-Totem of Miami, Inc.[2] was subjected to an armed robbery (A 1).

About a month later, on March 1, 1965, the Petitioner was arrested at his home at about 1:30 in the morning without a warrant (A 28). Petitioner was not taken before a magistrate (A 28), but was incarcerated in the Dade County jail. The next day, March 2, 1965, at 2:30 in the morning, he was identified in a line-up at the jail by a prosecuting witness, Loy Diehl (A 24). Another line-up was held on March 8, 1965, at which time the Petitioner was identified by another prosecuting witness, Ronald Diehl, the young son of the first prosecution witness (A 24).

Ten days after the arrest, and not until Petitioner had filed a Petition for Writ of Habeas Corpus, the State filed an Information charging him with robbery (A 1, 34).

At the trial the case for the prosecution essentially consisted of the testimony of Loy Diehl (the operator of the store that was robbed) and his son, Ronald, and their identification of the Petitioner, as well as the testimony of the law enforcement officer who had ordered the Petitioner's arrest and had conducted the line-ups (A 12-29; 32). All of the illegal incriminating evidence was, therefore, obtained during the period of Petitioner's unlawful detention.

As for the repeated line-ups, as previously noted, one of them took place at 2:30 in the morning (A 24) and the record is silent as to the time of the other line-ups.

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2. This is a unit of a small chain grocery store.

The record also reflects that the robber had been described initially to the police as a small individual, about 5 feet 6 inches, weighing approximately 130 pounds (A 13). In at least one case there were no small people in the line-up except the Petitioner (A 22) and the prosecuting witness (Ronald Diehl) picked the smallest man in the line-up (A 21-22).

It goes without saying, and the record so reflects, that the Petitioner was without the assistance of counsel during the repeated line-ups and the only person present, other than the prosecuting witness, was Detective Kahn (A 21).

It is also apparent from the record that the father and son gave their stories to the police officer together (A 19) and that both prosecuting witnesses had only a very brief time within which to observe the alleged robber (A 16; R 26).

Trial and Conviction

Despite the continued objections and protestations of Petitioner's trial counsel (A 4-5; 6-7; 8-9; 10-11; 30), the illegally obtained line-up evidence was used against the Petitioner and such illegal and incriminating evidence constituted the only evidence against the Petitioner. As a result thereof Petitioner was found guilty by a judge and jury in the Criminal Court of Record in and for Dade County, Florida, and was sentenced to 20 years in prison (A 31).

The Decision of the District Court of Appeal of Florida, Third District

On August 9, 1966, the District Court of Appeal of Florida, Third District, rendered its opinion (A 31-33).

The Court's opinion clearly recognizes that the action taken by the police officials against the Petitioner was wrong. However, with all due deference and without attempting to be facetious, the District Court's justification for its affirmance is that it has previously affirmed convictions where the accused was not taken before a magistrate contrary to Section 901.23, *Florida Statutes*, and where illegal evidence had been thereby obtained, and, therefore, the Court saw no point in departing from its prior decisions which it cites (A 33).

However, with perhaps a twinge of judicial conscience, the District Court of Appeal of Florida, Third District, as authorized by Article V, Section 4(2) of the *Constitution of Florida*, certified the case to the Supreme Court of Florida on the ground that the decision passed upon a question of great public interest because "it concerns a determination of when the denial of a preliminary hearing in violation of Section 901.23, Florida Statutes, is prejudicial to a defendant."

The Decision of the Supreme Court of Florida

The decision of the Supreme Court of Florida again reviews the unlawful sequence of events incident to Petitioner's arrest, line-ups and arraignment, and it also appears to find (A 34-37) that what transpired was wrong but it concludes that such wrongs to Petitioner did not constitute harmful or prejudicial error; notwithstanding the fact that the *only* evidence used against the Petitioner at the trial was the illegally obtained line-up evidence which was procured between the time of Petitioner's arrest without a warrant and his arraignment some 10 days later. Petitioner shall have more to say about the concept of prejudicial error in the course of his argument, post.

SUMMARY OF ARGUMENT

The Petitioner was arrested approximately a month after an alleged armed robbery and was taken from his home without a warrant by police officers at about 1:30 in the morning. He was not taken before a committing magistrate, but was incarcerated in the Dade County jail. In fact, the Petitioner was *never* taken before a committing magistrate. For 10 days he was subjected to repeated line-ups without the aid of counsel; one of which took place at 2:30 in the morning. After the illegal and incriminating line-up evidence had been obtained, but not until the Petitioner had filed a Petition for Writ of Habeas Corpus, the State filed an Information charging him with robbery. The only incriminating evidence used at the trial was that obtained during Petitioner's unlawful detention.

On these uncontroverted facts, it is Petitioner's first contention that the *McNabb-Mallory Rule* presently applicable to federal courts should be applied as a constitutional mandate to state court proceedings. As this Court knows, this rule, in effect, provides that evidence obtained while a defendant is unlawfully detained, in violation of Rule 5(a) of the *Federal Rules of Criminal Procedure,* requiring that a person under arrest be taken to a committing magistrate without unnecessary delay, is not admissible and a conviction based on such evidence cannot be sustained.

The public policy behind this rule in federal courts is equally applicable to state court proceedings. Most of the states (including Florida) have a statutory provision similar to Rule 5(a) but, as is apparent in this case, the rule is not always enforced with vigor. The fact that most of the states have such legislation clearly evidences

the extent to which this policy is ingrained in our concepts of due process of law.

This Court has in recent times made it clear that the due process provisions of the Federal Constitution require that a state afford a defendant due process of law, not only during the period of his formal trial but throughout the entire accusatory period commencing with his arrest. The rationale of these decisions would seem to indicate that due process should also include, as a constitutional requirement, that an accused be taken before a magistrate within a reasonable period of time after his arrest.

Moreover, the unlawful detention of the Petitioner, contrary to the assertion of the Florida Supreme Court, was highly prejudicial. This is so because all of the incriminating evidence against the Petitioner was gathered during his unlawful detention. Therefore, if Petitioner had been timely taken before a magistrate, the magistrate would have had no alternative but to discharge him for lack of probable cause.

The repeated line-ups in this cause were held without the accused having the assistance of counsel. They are, therefore, illegal under the decisions of this Court. While the decisions of this Court are not retrospective with regard to illegal line-ups, nevertheless such line-ups add to the totality of circumstances involved in this proceeding.

Petitioner's final contention in this cause is that under the decisions of this Court the totality of circumstances in this cause requires a reversal under the mandate of the Fourteenth Amendment to the *Constitution of the United States*. A mere statement of the pertinent

facts would seem to call for relief. The circumstances of this case reveal a monstrous affront to the fundamental dignities of mankind and this conviction cannot stand.

ARGUMENT

As previously noted, the Petitioner was arrested and was taken from his home without a warrant by police officers at about 1:30 in the morning. He was not taken before a committing magistrate, but was incarcerated in the Dade County jail. For 10 days he was subjected to repeated line-ups without the aid of counsel. After the illegal and incriminating line-up evidence had been obtained, but not until Petitioner had filed a Petition for Writ of Habeas Corpus, the State filed an Information charging him with robbery.

The Petitioner was never taken before a committing magistrate (A 31).

The McNabb-Mallory Rule Presently Applicable to Federal Courts Should Be Applied to State Court Proceedings As a Constitutional Mandate

The so-called *McNabb-Mallory Rule* stems from the decisions of this Court in *McNabb* v. *United States of America*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, and *Mallory* v. *United States of America*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479. This rule, in effect, provides that evidence obtained while a defendant is unlawfully detained, in violation of Rule 5(a) of the *Federal Rules of Criminal Procedure*, requiring that a person under arrest be taken to a committing magistrate without unnecessary delay, is not admissible and a conviction based on such evidence cannot be sustained. See *United States* v. *Klapholz*, 2d Cir., 230 F.2d 494, cert. denied, 351 U.S. 924.

Similar provisions, in the form of legislation, requiring that arrested persons be promptly taken before a committing authority appears on the statute books of nearly all of the states, including Florida.[3]

Although the *McNabb-Mallory Rule* has heretofore been expressly applied only to proceedings in federal courts, it has been predicted that such a rule might some day apply to state court proceedings. In fact, such a prediction was made by the Supreme Court of Florida, in *Milton* v. *Cochran*, Fla., 147 So.2d 137, at 141, wherein it is stated:

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3. Alabama—Code, 1940, Title 15, § 160; Alaska—Stat., 1963, § 12.25.150; Arizona—Code, 1939, §§ 44-107, 44-140, 44-141; Arkansas—Digest of Statutes, 1937, §§ 3729, 3731; California—Penal Code, 1941, §§ 821-29, 847-49; Colorado—Statutes, 1935, c 48, § 428; Connecticut—Gen. Stat., 1930, § 239; Delaware—Rev. Code, 1935, §§ 4456, 5173; District of Columbia—Code, 1940, §§ 4-140, 23-301; Florida—Statutes, 1941, §§ 901.06, 901.23; Georgia—Code, 1933, §§ 27-210, 27-212; Hawaii—Rev. Stat. of Hawaii, 1955, § 255-9; Idaho—Code, 1932, §§ 19-515, 19-518, 19-614, 19-615; Illinois—Rev. Stat., 1941, c 38, §§ 655, 660; Indiana—Baldwin's Stat. Anno., 1934, § 11,484; Iowa—Code, 1939, §§ 13,478, 13,481, 13,486, 13,488; Kansas—Gen. Stat., 1935, § 62-610; Kentucky—Code, 1938, §§ 45-46; Louisiana—Code of Criminal Procedure, 1932, §§ 66, 79, 80; Maine—Rev. Stat., 1930, c 145, § 9; Massachusetts—Gen. Laws, 1932, c 276, §§ 22, 29, 34; Michigan—Stat. Anno., 1938, §§ 28.863, 28.872, 28.873, 28.885; Minnesota—Mason's Stat., 1927, c 104, §§ 10,575, 10,581; Mississippi—Code, 1930, c 21, § 1230; Missouri—Rev. Stat., 1939, §§ 3862, 3883; Montana—Rev. Code, 1935, §§ 11,731, 11,739-40; Nebraska—Comp. Stat., 1929, § 29-412; Nevada—Comp. Laws, 1929, §§ 10,744-48, 10,762-64; New Hampshire—Pub. Laws, 1926, c 364, § 13; New Jersey—Rev. Stat., 1937, § 2:216-9; New York—Code of Criminal Procedure, 1939, §§ 158-59, 165, 185; North Carolina—Code, 1939, §§ 4528, 4548; North Dakota—Comp. Laws, 1913, §§ 10,543, 10,548, 10,576, 10,578; Ohio—Throckmorton's Code, 1940, §§ 13,432-3, 13,432-4; Oklahoma—Statutes, 1941, Title 22, §§ 176-77, 181, 205; Oregon—Code, 1930, §§ 13-2117, 13-2201; Pennsylvania—Purdon's Stat. Anno. Perm. ed Title 19, §§ 3, 4; Rhode Island—Gen. Laws, 1938, c 625, § 68; South Carolina—Code, 1942, §§ 907, 920; South Dakota—Code, 1939, §§ 34.1608, 34.1619-24; Tennessee—Michie's Code, 1938, §§ 11,515, 11,544; Texas—Code of Criminal Procedure, 1936, Arts. 233-35; Utah—Rev. Stat., 1933, §§ 105-4-4, 105-4-5, 103-26-51; Virginia—Code, 1942, §§ 4826, 4827a; Washington—Rev. Stat., 1932, § 1949; West Virginia—Code, 1937, § 6150; Wisconsin—Statutes, 1941, § 361.08; Wyoming—Rev. Stat., 1931, §§ 33-108, 33-110, 33-115.

> "We would be derelict in our duty if we did not here point out that continued violation of these statutes are certain to result in the McNabb rule, or some version thereof, being adopted by this State or being imposed on our state courts by decisions of federal courts. Recent history promises this as an event reasonably to be expected."

It is respectfully submitted that the time has come to make a prophet out of the Supreme Court of Florida and make the *McNabb-Mallory Rule* applicable to state court proceedings[4] as a constitutional requirement.

In the first place, it should be noted that this Court in both the *McNabb* and *Mallory* cases, *supra*, did not reject the concept of this rule being a constitutional mandate. The Court in both decisions expressly refused to pass upon the constitutional question at that time. In the *McNabb* case, for example, the Court states, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, at 824:

> "In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us."

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4. Some states have voluntarily applied the rule to their statutes. Michigan and Delaware have expressly overturned convictions where the accused was held for an unreasonable period of time prior to being taken before a magistrate. See *People* v. *Hamilton*, 359 Mich. 410, 102 N.W.2d 738, and *Vorhauer* v. *Delaware*, Del., 212 A.2d 886. But some states, in addition to Florida, refuse to honor their own statutory requirements. See, e.g.: Arizona—*State* v. *Hudson*, 89 Ariz. 103, 358 P.2d 332; Mississippi—*Parker* v. *State*, Miss., 141 So.2d 546; New Jersey—*State* v. *Hodgson*, 44 N.J. 151, 207 A.2d 542; Hawaii—*State* v. *Evans*, Haw., 372 P.2d 365; Illinois—*People* v. *Novak*, 33 Ill.2d 343, 211 N.E.2d 235; Iowa—*State* v. *Hodge*, 252 Ia. 449, 105 N.W.2d 613; Montana—*State* v. *Nelson*, Mont., 362 P.2d 237; Nebraska—*Gallegos* v. *Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86; Washington—*State* v. *Hoffman*, Wash., 392 P.2d 237.

It is respectfully submitted that the time is nigh to decide[5] this constitutional issue with respect to state court proceedings.

In the *McNabb* case, *supra*, Mr. Justice Frankfurter states in clear and unequivocal language the public policy and purpose behind the *McNabb Rule* (87 L.Ed., at 825):

> "The purpose of this impressively persuasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society.'"

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5. On November 26, 1951, this Court decided the case of *Gallegos* v. *Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86, in which this question was apparently involved. However, it does not appear that any one of the reported opinions constitutes a decision of this Court since the Court could not agree upon an opinion. It is also suggested that very little vitality remains in the *Gallegos* case, *supra*, as a precedent, in view of this Court's more recent decisions in *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 977; and *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. At least one commentator believes that this Court now rests the McNabb-Mallory Rule on constitutional grounds, and that the rule applies to the states as well through the Due Process Clause. See Broeder, *Wong Sun—A Study in Faith and Hope*, 42 Neb.L.Rev. 483, at 564, et seq.

This policy pronouncement is equally applicable to state court proceedings.

The purpose of the preliminary hearing is, of course, to weed out groundless or unsupported charges of grave offenses, and to relieve the accused the degradation and expense of a criminal trial. A quick determination of probable cause is a necessity in any scheme of due process of law.

Although resolution of the probable cause issue is the main objective of the hearing, it is apparent that it has many other functions: For example, it affords the accused the opportunity to have bail set, which is a constitutional right, and it affords him the opportunity of obtaining counsel which is also a constitutional right. It also is a deterrent to unlawful custodial interrogation, unlawful line-ups without counsel and other police harassment.

The fact that so many of our states[6] have enacted legislation requiring an accused to be promptly taken before a magistrate without unnecessary delay clearly evidences the extent to which this policy is ingrained in our concepts of due process of law.

It would seem clear that the due process provisions of the Federal Constitution require that a state afford a defendant due process of law not only during the period of his formal trial but throughout the entire accusatory period commencing with his arrest. See *Watts* v. *Indiana*, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801; *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 977; *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; and *Gilbert* v. *California*, 388 U.S. 263, 87

6. See footnote 3.

S.Ct. 1951, 18 L.Ed.2d 1178. Hence, due process should include the constitutional requirement that an accused be taken before a magistrate within a reasonable period of time after his arrest.

The constitutional requirement that Petitioner, under the circumstances of this case, should have been taken before a magistrate by the police officers, is neither new nor novel. For example, this Court has, on constitutional grounds, set aside convictions in state courts of persons "who have been unlawfully held incommunicado without advice of friends or counsel," *Ward* v. *Texas,* 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663, 1667; and see *Brown* v. *Mississippi,* 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; *Chambers* v. *Florida,* 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; *Canty* v. *Alabama,* 309 U.S. 629, 60 S.Ct. 612, 84 L.Ed. 988; *White* v. *Texas,* 310 U.S. 530, 60 S.Ct. 1032, 84 L.Ed. 1342; *Lomax* v. *Texas,* 313 U.S. 544, 61 S.Ct. 956, 85 L.Ed. 1511; and *Vernon* v. *Alabama,* 313 U.S. 547, 61 S.Ct. 1092, 85 L.Ed. 1513.

In fact, the case of *Watts* v. *Indiana,* 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801, comes very close to being on point. Although this Court did not expressly, in that case, apply the *McNabb-Mallory Rule,* it did reverse a state court conviction on constitutional grounds where the accused was not promptly given a preliminary hearing before a magistrate as required by the law of Indiana. In that case, this Court noted (93 L.Ed., at 1806-1807):

> "Although the law of Indiana required that petitioner be given a prompt preliminary hearing before a magistrate, with all the protection a hearing was intended to give him, the petitioner was not only given no hearing during the entire period of interrogation but was without friendly or professional aid and without advice as to his constitutional rights."
>
> * * *

> "The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, *the right to a prompt hearing before a magistrate,* the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands."
>
> * * *
>
> "In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken."

The observation of Mr. Justice Douglas in his concurring opinion to the *Watts* decision is also pertinent (93 L.Ed., at 1808):

> "Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magistrate."

The right of an individual to be protected against unlawful infringement by governmental officials should be preserved. As Mr. Justice Brandeis once observed:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipres-

> ent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States,* 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944, 959 (dissenting opinion).

It will probably be urged that the application of the *McNabb-Mallory Rule* to state court proceedings will hamper effective law enforcement. Nothing could be further from the truth. As this Court knows, the Federal *Bureau of Investigation* has been required to live with Rule 5(a) of the *Federal Rules of Criminal Procedure* and the *McNabb-Mallory Rule* for many, many years and it is still recognized as one of the top law enforcement agencies in the nation, if not the world.

The Illegal Line-Ups

The repeated line-ups of the Petitioner in this cause, even if they had not been conducted when he was unlawfully detained, were illegal in and of themselves inasmuch as Petitioner did not have counsel present at the time. *United States* v. *Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149; *Gilbert* v. *California,* 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178. Of course, while it is true that these illegal line-ups cannot be a basis of a reversal in and of themselves, *Stovall* v. *Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, the fact remains that such line-ups, in the circumstances of this case, are nonetheless illegal.

The language of this Court in the *Wade* case, *supra,* is singularly applicable to the case at bar (18 L.Ed.2d, at 1158-1159):

"But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.' The Case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."

* * *

"And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

"Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'"

In the instant case the Court will recall, as reflected by the record, that the robber was initially described as a small person, about 5 feet 6 inches tall, weighing approximately 130 pounds (A 13), and the police employed a line-up in which the Petitioner was the *only* small person

present (A 22) and the prosecuting witness picked the smallest man in the line-up (A 21-22).

Prejudicial Error

The only fair analysis of the decision of the Supreme Court of Florida is that that Court found that the unlawful circumstances and events were harmless error (A 34-37). This conclusion of the learned Florida Court is difficult to follow.

It is to be recalled that the only evidence used against the Petitioner at the trial was the evidence resulting from the illegal line-ups. If the Petitioner had been promptly taken before a magistrate as required by Section 901.23, *Florida Statutes*, such evidence would not have been available to the prosecution as it was not yet in being. Since we must assume that the magistrate would do his duty, it must necessarily follow that Petitioner would have been released for lack of probable cause had he been afforded his right of being taken before a magistrate as required by the statute. The State's failure to do this would seem to constitute prejudicial error of the worst kind.

As this Court stated in *Mallory* v. *United States of America*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479, at 1484:

> "It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'"

The above quote is particularly applicable to the case at bar.

The Supreme Court of Florida also finds comfort (A 36) from the fact, which it quotes with emphasis, that the Petitioner did not ask to be taken before a magistrate. It is respectfully submitted that the Court's confident re-

liance on the above assertion is misplaced. A statement made by this Court in *Carnley* v. *Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70, at 77, is applicable here:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

The rationale of this Court's holding in the *Carnley* case would seem to apply to the charge that the Petitioner did not request to be taken before a magistrate. The record on this point is silent. Also in the *Carnley* case, *supra*, (8 L.Ed.2d 70, at 76), this Court stated:

> "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."

This proposition would seem to apply with equal force in the context of requiring an accused to be taken before a magistrate.

Moreover, this Court's holding in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, that there must be a clear, intelligent waiver of one's constitutional rights, would seem to dispose of the Supreme Court of Florida's contention that the Petitioner should have asked to be taken before a magistrate.

The record in this cause is also silent with regard to custodial interrogation, although it is clear that Petitioner never confessed. It would seem to be a reasonable presumption from a recognition of police practices[7] that Petitioner was constantly and continuously grilled during the 10-day period that he was unlawfully detained.[8]

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7. See the discussion of such practices in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

8. Petitioner has advised counsel that this was definitely true although in fairness to the State it is not a part of the record.

The Totality of Circumstances in This Cause Requires a Reversal under the Mandate of the Fourteenth Amendment to the Constitution of the United States

Even if this Court, in its wisdom, decides against the application of the *McNabb-Mallory Rule* to state court proceedings as a constitutional mandate, it is respectfully submitted that the totality of circumstances in the instant case requires a reversal under the mandate of the Fourteenth Amendment to the *Constitution of the United States.* See *Stovall* v. *Denno*, 388 U.S. 293, 301, 87 S.Ct. 1967, 18 L.Ed.2d 1199, 1206.

The concept of applying the Fourteenth Amendment to a state court proceeding is well stated in the case of *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, at 188:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski v. New York, supra (342 US at 416, 417, 89 L ed 1039, 65 S Ct 781). These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Massachusetts, 291 US 97, 105, 78 L ed 674, 677, 54 S Ct 330, 90 ALR 575, or are 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 US 319, 325, 82 L ed 288, 292, 58 S Ct 149."

And, again, at 96 L.Ed., p. 190:

> "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' See Mr. Chief Justice Hughes, speaking for a unanimous Court in Brown v. Mississippi, 297 US 278, 285, 286, 80 L ed 682, 686, 687, 56 S Ct 461."

Mr. Justice Douglas' observation in his concurring opinion in the *Rochin* case, *supra,* with respect to the Fifth Amendment to the Constitution, is suggested as applicable here (96 L.Ed., at 193):

> "If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the state courthouse."

The totality of circumstances in the instant case reflects that approximately a month after an alleged crime, the Petitioner was snatched from his home without a warrant, placed under arrest and incarcerated in the Dade County jail, and was never taken before a magistrate. He was held for some 10 days prior to being arraigned and during the period of his unlawful detention he was forced to appear in repeated illegal line-ups, at which incriminating evidence was gathered and only after the incriminating evidence was gathered and only after a Petition for Writ of Habeas Corpus had been filed was he arraigned. The line-up itself was of dubious reliability and the only evidence used against him in the trial was this illegal and incriminating evidence obtained during the unlawful detention.

A mere statement of the pertinent facts would seem to call for relief. As this Court observed in *McNabb* v. *United*

States of America, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, at 827:

> ". . . a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here."

CONCLUSION

The circumstances of this case reveal a monstrous affront to the fundamental dignities of mankind. This conviction cannot stand.

Respectfully submitted,

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APPENDIX

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Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V

"No person . . . shall be compelled in any criminal case to be a witness against himself."

United States Constitution, Amendment VI

"In all criminal prosecutions the accused shall . . . have the assistance of counsel for his defense."

United States Constitution, Amendment XIV

§1

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Florida Statute in Effect at All Times Material to This Proceeding

Sec. 901.23 (2 Fla.Stat. 1957, p. 3850)

Duty of officer after arrest without warrant.—An officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before the nearest and most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest and most accessible magistrate in the same county.